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FILED BY CLERK  
OCT 16 2009  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

ANS DISTRIBUTING, INC., an Arizona )  
corporation, )  
)  
Plaintiff/Appellant, )  
)  
v. )  
)  
VISA INTERNATIONAL SERVICE )  
ASSOCIATION, a foreign corporation, )  
)  
Defendant/Appellee. )  
\_\_\_\_\_ )

2 CA-CV 2009-0034  
DEPARTMENT A  
MEMORANDUM DECISION  
Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20065086

Honorable Paul E. Tang, Judge

AFFIRMED

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By J. Emery Barker and Paul A. Loucks

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E S P I N O S A, Presiding Judge.

¶1 Appellant ANS Distributing, Inc. (ANS) appeals the trial court’s grant of summary judgment in favor of VISA International Service Association (VISA) on ANS’s breach of contract and negligent representation claims against VISA. For the following reasons, we affirm.

### **Factual and Procedural History**

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 475, ¶ 2, 212 P.3d 853, 855 (App. 2009).

¶3 In 1997, ANS, an Arizona corporation that sells and distributes gasoline service-station equipment, signed a merchant agreement for credit-card processing services with its bank,<sup>1</sup> allowing ANS to accept its customers’ VISA credit cards for payment. Under this agreement (the contract), when an ANS customer pays with a VISA credit card, VISA forwards the amount charged to an ANS account, less a portion of the amount it retains as a processing fee. The contract further provided that, in the event VISA discovered any charges were fraudulent, it would institute a “chargeback,” under which ANS would be required to reimburse VISA the entire amount credited to ANS.

¶4 In 2005, ANS received over the Internet credit card orders in excess of \$150,000 from customers in Singapore. VISA preauthorized the transactions and forwarded payment to ANS but later discovered the charges were fraudulent and issued chargebacks

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<sup>1</sup>The original account was with Norwest Bank and then passed to its successor, Wells Fargo Bank. Neither bank is a party to this action.

to ANS. Thereafter, ANS filed suit against VISA, alleging it had breached the contract by “authorizing charges and crediting ANS’s accounts . . . [and then] initiat[ing] chargebacks against [it] and debit[ing its] account in breach of [the contract].” Alternatively, ANS alleged VISA was liable for negligent misrepresentation because it had “made representations to ANS that various charges were approved and that ANS would be compensated for those charges.” VISA denied these allegations and asserted ANS was barred from seeking a legal remedy because it had “failed to timely notify [VISA] of any adjustment requests.”

¶5 After answering ANS’s initial complaint, VISA moved for summary judgment, arguing ANS’s contract claims failed as a matter of law because the contract specifically allocated to ANS all risks associated with “[e-]commerce.”<sup>2</sup> VISA also argued it was entitled to summary judgment because ANS’s negligent misrepresentation claim was barred by the economic loss doctrine and because ANS did not allege competent evidence to support this claim.

¶6 ANS opposed VISA’s motion, arguing the contract was not fully integrated and failed to manifest the understanding between the parties that VISA would engage in additional fraud detection activities in ANS’s e-commerce transactions. It also disputed VISA’s claims that the economic loss doctrine barred recovery in its negligent misrepresentation action.

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<sup>2</sup>E-commerce transactions are those undertaken when the credit card is not physically present, such as orders placed via the Internet.

¶7 In August 2008, the trial court entered summary judgment in favor of VISA and awarded it \$24,091 in attorney fees. The court found there were no issues of material fact and the contractual language clearly and unambiguously allocated the risk of e-commerce transactions to ANS, obviating any need to examine extrinsic evidence of the parties' expectations. It also found the economic loss doctrine barred ANS's claim for negligent misrepresentation. We have jurisdiction over ANS's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

### **Discussion**

¶8 ANS first contends the trial court should have denied the motion for summary judgment because there were factual questions about VISA's "responsibilities and actions under [the contract]." We review de novo whether any genuine issues of material fact exist and whether the trial court erred in applying the law. *Sage v. Blagg Appraisal Co.*, 221 Ariz. 33, ¶ 6, 209 P.3d 169, 170 (App. 2009).

¶9 Although it is undisputed the parties' respective rights were governed by the merchant agreement, ANS maintains the contract "was not a fully[]integrated reflection of the parties' agreement" because it "fails to reflect oral representations that V[ISA] would undertake for an additional charge, additional activities to discover fraudulent [e-]commerce transactions." ANS devotes significant portions of its brief to setting out the legal principles of contract interpretation and arguing that this is a situation warranting the introduction of extrinsic evidence to prove the meaning of this contract. It asserts, without citation to the

record, that it had presented “uncontroverted evidence that the written contract fail[ed] to include material terms of the parties’ agreement.”

¶10 A party opposing summary judgment must “come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial.” *Nat’l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 12, 180 P.3d 977, 980 (App. 2008). Summary judgment “should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

#### Breach of Contract

¶11 In support of its motion for summary judgment, VISA relied on the language of the contract, which ANS concedes is unambiguous. The contract terms expressly provide that they contain the complete and only understanding between the parties, and the contract does not mention any agreement or obligation to undertake additional measures. *See Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009 (proponent of summary judgment required to “point out by specific reference to the relevant discovery that no evidence existed to support opponent’s claim).

¶12 In response, ANS relied solely on an affidavit from its comptroller, Thomas Spencer. In it, Spencer asserted, “The higher fees ANS pays were represented to be required by V[ISA] to allow it to cover the increased fraud risk when the card is not physically present for a transaction,” and “ANS believed that the amounts it paid to process [e-]commerce

transactions that were in excess of the charges it paid when card holders were present . . . paid for protection against the increased fraud risk inherent in [e-]commerce transactions.” Significantly, however, Spencer does not avow personal knowledge of the purported “represent[ation]” by VISA. Nor does he provide any details about when, where, in what context, or to whom they were made. His affidavit also provides no basis for knowing what ANS believed or did not believe about its contract with VISA. Likewise, ANS has presented no evidence that Spencer either signed the contract, participated in any negotiations concerning the agreement, or ever spoke with a VISA representative prior to the chargeback dispute.<sup>3</sup>

¶13 VISA argues, as it did below, that the statements in Spencer’s affidavit “amounted to either inadmissible hearsay or mere conclusions” that were insufficient to show a genuine issue of material fact. We agree. A party opposing summary judgment “must set forth *specific facts* showing that there is a genuine issue for trial.” Ariz. R. Civ. P. 56(e) (emphasis added). And, “opposing affidavits shall be made on personal knowledge [and] set forth such facts as would be admissible in evidence.” *Id.* ANS failed to present any specific

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<sup>3</sup>In fact, in his February 2008 affidavit, Spencer stated that he “ha[d] been with ANS for 10 years.” It is undisputed ANS signed its contract with VISA in March 1997, which would indicate Spencer was not even employed by ANS when the merchant agreement was executed and thus would not have witnessed any contract negotiations or purported representations by VISA at that time. Although ANS asserted at oral argument that Spencer had miscalculated the number of years he had been employed by ANS, we do not consider this claim, which is not supported by the record before us and was brought to this court’s attention only at oral argument. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004) (parties may not raise new issues and claims at oral argument); *CDT, Inc., v. Addison, Roberts & Ludwig, C.P.A.*, 198 Ariz. 173, ¶ 19, 7 P.3d 979, 984 (App. 2000) (appellate court will not consider matters outside the record on appeal).

facts admissible in evidence. Instead, as VISA points out, ANS rests on its vague assertion that, “at some unspecified time, some unidentified person at ANS was led to believe by some unidentified person at V[ISA] that an additional processing fee . . . was intended to protect ANS from fraudulent Internet transactions.” Thus, Spencer’s affidavit was insufficient to satisfy ANS’s burden “to come forward with evidence establishing the existence of a genuine issue of material fact” as required by Rule 56. *Nat’l Bank*, 218 Ariz. 112, ¶ 12, 180 P.3d at 980; *see Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008 (affidavits containing inadmissible evidence insufficient to withstand motion for summary judgment).<sup>4</sup>

¶14 Accordingly, because the trial court correctly found no issue of material fact existed to bar summary judgment, it properly considered whether VISA was entitled to judgment as a matter of law. *See Nat’l Bank*, 218 Ariz. 112, ¶ 18, 180 P.3d at 981. As ANS conceded, the written contract was clear and unambiguous and contained no mention of VISA’s purported obligation to conduct additional fraud-monitoring of e-commerce transactions. Thus, the trial court did not err in concluding as a matter of law that VISA did not breach the contract by failing to undertake additional fraud-prevention measures on behalf of ANS, and summary judgment was appropriate on this issue.

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<sup>4</sup>We note that, even assuming ANS had met its burden of establishing an issue of fact as to whether VISA had agreed to undertake additional fraud-detection activities, it appears summary judgment would still be appropriate because ANS provided no evidence VISA failed to undertake these measures, or that if it had failed, VISA and not ANS would be responsible for the losses arising out of fraudulent e-commerce transactions.

## Negligent Misrepresentation

¶15 Similarly, VISA was entitled to summary judgment on ANS's claim of negligent misrepresentation. Although the trial court ruled the economic loss doctrine barred this claim, we need not review its decision on that basis because we may uphold a trial court's ruling if it is correct for any reason. *See Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 25, 10 P.3d 1181, 1190 (App. 2000). Even if we assumed the economic loss doctrine did not bar ANS's claim, VISA is still entitled to summary judgment because ANS failed to demonstrate in opposition to the motion that it could establish all the necessary elements of its claim at trial. *See Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992) (summary judgment appropriate when defendant asserts lack of evidence to support essential element of plaintiff's claim and plaintiff unable to present prima facie case).

¶16 To prevail on a motion for summary judgment, the moving party must first meet its burden of production. *See Nat'l Bank*, 218 Ariz. 112, ¶ 18, 180 P.3d at 981. To satisfy that burden, the moving party need not negate the nonmoving party's claim or defense if the nonmoving party bears the burden of proving such a claim at trial. *Id.* ¶ 22. "Instead, the moving party need only 'point out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the [nonmoving party's] claim' or defense." *Id.*, quoting *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009 (alterations in *Nat'l Bank*).

¶17 Arizona has adopted the definition of negligent misrepresentation set forth in the Restatement of Torts. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 30-31, 945 P.2d 317, 341-42 (App. 1996). A party may be liable for negligent misrepresentation when he or she “in the course of his [or her] business, profession or employment, or in any other transaction in which he [or she] has a pecuniary interest, *supplies false information for the guidance of others in their business transactions* . . . if he [or she] fails to exercise reasonable care or competence in obtaining or communicating the information.” Restatement (Second) of Torts § 552 (1977) (emphasis added). As noted above, ANS failed to produce admissible evidence that VISA had made any representations beyond those contained in the written contract.<sup>5</sup> Because ANS was unable to establish this element of its claim, it is immaterial whether the economic loss doctrine would bar this cause of action.

#### Attorney Fees

¶18 VISA requests its attorney fees on appeal pursuant to A.R.S. § 12-341.01. We grant it its reasonable attorney fees upon compliance with Rule 21, Ariz. R. Civ. App. P.

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<sup>5</sup>Without citation to the record, ANS asserts that it “formed its basis [sic] about the fully[]integrated contract based on discussions it had with VISA before it signed the merchant agreement” and had “noted that VISA charges a higher amount for [e-]commerce transactions and asked before it executed the agreement whether VISA’s basis for doing so was that it performed additional fraud detection services.” It also claims, again without citation to the record, “In inducing ANS to execute a service agreement, VISA’s representatives led ANS to believe that VISA would perform additional services.” In any event, we see no evidence that any discussions with VISA took place or that ANS ever noted or inquired about any discrepancy between the charges for e-commerce and other transactions.

**Disposition**

¶19 For the reasons outlined above, the entry of summary judgment is affirmed.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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WALLACE R. HOGGATT, Judge\*

\*A judge of the Cochise County Superior Court authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed September 17, 2009.